Supreme Court, U.S.
FILED
FEB 11 1980
MICHAEL RODAK, JR., CLERK

No. 79-890

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

Lamers Dairy, Inc., and Jerome Fischer
d/b/a Utschig Dairy, Petitioners

v.

Secretary of Agriculture

On Petition For A Writ of Certiorari To
The United States Court of Appeals For
The Seventh Circuit

REPLY MEMORANDUM FOR THE PETITIONERS IN ANSWER TO THE RESPONDENT'S MEMORANDUM IN OPPOSITION

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The respondent's Memorandum in Opposition to the above cited petition is inaccurate, inconsistent and therefore misleading and must be answered. One must keep in mind that it was this Court in Nebbia v. New York, 291 U. S. 502 (1938) at page 525 that said in essence that governmental regulation for public welfare shall not be unreasonable, arbitrary, or capricious, and must have a real and substantial relation to the objects sought to be attained, and the reasonableness of each regulation depends upon the relevant facts (Pet. 20).

It is also this Court which stated (Pet. 22) in Shoemaker v. United States, Dist. Col. 1893, 13 S. Ct. 361, 147 U. S. 298, 37 L. Ed. 170:

> "The courts have power to determine whether the use for which private property is authorized by the legislature to be taken is in fact a public use." (Emphasis added.)

1. It is of no surprise that the courts below followed this Court's decision in Rock Royal.

> "District Courts and Courts of Appeals must follow decisions and interpretations of Supreme Court in spite of any individual predilections that may exist." United States v. Chase, 281 F. 2d 225 (7th Cir. 1960).

Therefore, the fact that the lower courts followed this Court's decision in Rock Royal should have no bearing on whether or not this case is reviewed by this Court.

2. The respondent says at page 4 of his memorandum: "The ruling below does not conflict with any decision of the other courts of appeals." The petitioners wish to remind this Court that the ruling below does conflict with this Court's decision in Shoemaker v. United States cited above. Changed circumstances are the relevant facts which are material to the administration of justice, and no one can go to the Congress of the United States in search of justice. This can only be found in the courts, and the petitioners believe that the courts below misinterpreted the Supreme Court ruling in National Broiler Marketing Association v. United States, 436 U.S. 816, 827 (1978). (Pet. 21, 22)

3. It is stated in the respondent's memorandum at page 4: " . . . it is apparent that the decision in Rock Royal did not turn upon the presence or absence of particularized market conditions." This is not true, for in the respondent's memorandum at page 5 he quotes Rock Royal where it is stated:

> " . . . It is ancillary to the price regulation designed, as is the price provision, to foster, protect and encourage interstate commerce by smoothing out the difficulties of the surplus and cut-throat competition which burdened this marketing."

This means that the Court did take into consideration the

cut-throat competition which burdened the market at that time. As this statement is made in reference to the producer settlement fund, it is therein seen that the producer settlement fund was to prevent producers from bidding lower prices for milk, thereby protecting the less efficient producers from being driven out of the marketplace by more efficient competition and endangering the supply of milk for the New York market. (It also prevents producers from selling milk at a price below artificially high prices established by regulation.)

Further, Justice Reed says in Rock Royal under "Adoption of the Order":

> "Both the Agency and the League announced repeatedly that handlers would be required to pay uniform price and that no handler would receive a competitive advantage over the others."

He further states under "Correlation of the Order and the Act":

> "Whether by cooperative or not, the defendant corporations have no financial interest in the producer settlement fund. All defendants pay into, or draw out of, that fund in accordance with their utilization of the milk delivered to them by their patrons. The defendants profit or loss depends on the spread each receives between the class price and the sale price." (Emphasis added.)

When these statements from Rock Royal of the relevant facts are compared to the material facts to the consideration of the questions presented (Pet. 11 et al.) it becomes clearly evident that this Court in 1939, did not foresee the possibility of competitive inequity and subsidation between the fluid portion of the industry versus the manufacturing portion of the industry which could result. This Court could not foresee in 1939 that

a) cooperatives through the power of block voting for their members could control decisions by the Department of Agriculture with the threatened non-existence of

federal orders through their voting power.

b) That through this control they could manipulate decisions on the setting of price structures and other regulations under the orders.

c) That control of the setting of prices under federal regulation could result in further competitive inequities, subsidation to manufacturing handlers from the fluid portion of the industry, and undue price enhancement in the form of regulated artificially high Class I prices.

d) That the underlying inequities in this system could lead to monopoly control over markets where one major cooperative alone now controls over ten percent of this nation's milk supply and that this monopolization, if allowed to continue, can virtually destroy the free enterprise system in the area of milk marketing (Pet. 28).

This Court did consider the presence of particularized market conditions in Rock Royal, contrary to the opinion of the respondent.

4. Respondent also states at page 4 that "'changed circumstances' upon which petitioners rely are presented as facts without record or other citation (see Pet. 25-27; Pet. App. 23)." This is not true.

First and foremost, it is the petitioners' understanding that a petition presents only the facts as it is not a brief on the merits and that it is in a "brief on the merits" that the facts are supported by record, public statistics, federal decisions, and common knowledge which the petitioners intend to use in detail upon the granting of a review by this Court. The petitioners did not cite or quote the record because the Supreme Court does not have the record at this point in time and will not have it until after the granting of a writ of certiorari.

The respondent relies on the Department of Agriculture decision cited at Petitioner's Appendix 23 which states: "Petitioners contend that the economic conditions relating to milk production and marketing are not the same as they were in 1939 when the Rock Royal case sustained the constitutionality of market-wide pooling under the Act. However, petitioners cite no evidence in support of their argument from the promulgation hearing

records upon which the Order and its amendments are based. As shown below, the validity of the Order must be tested, from an evidentiary standpoint, solely on the basis of the evidence adduced at the promulgation hearings . . ."

To fully understand this conclusion by the Department of Agriculture, the Court should know that the petitioners herein have been regulated by federal milk marketing orders for over twenty years and have partaken in approximately twelve federal order hearings, and in these hearings have testified as to the inequities and the unfairness of the regulations involved. The petitioners twice petitioned the Department of Agriculture in 1973 and in 1976 for an "individual handler pool" which does not take money between handlers and the Department refused hearing. Reason for the refusal of the hearings was that "the cooperatives would not approve an Order with an individual handler pool", with no considerations to the inequities involved.

This Court should also understand that in promulgation hearings, the hearing officer does not have the power of contempt of court nor the power of subpoena and therefore, under cross examination, witnesses can falsify evidence and not be made to answer questions which would show their testimony false, which has happened on many occasions. Most importantly, promulgation hearings cannot be held for the purpose of challenging the constitutionality of the Act, and therefore changed circumstances raised as evidence in federal order promulgation hearings as to the constitutionality of the Act are irrelevant. This evidence can only be brought in a hearing before the Department of Agriculture in its quasi-judicial rather than in its quasi-legislative capacity.

In administrative remedies procedures under the Department's quasi-judicial capacity, the petitioners herein brought in seven witnesses to testify as to the changed marketing conditions relative to the constitutional issues including expert witness Dr. Roland Bartlett, professor of agriculture economics with the University of Illinois. All of the testimony brought by the petitioners to the Department of Agriculture was refused as

evidence as the Department of Agriculture held that the only evidence that could be brought was that which was raised in promulgation hearings. Petitioners then proceeded to cite promulgation hearing records which proved the inequities and changed circumstances in the system and the Secretary misconstrued the purpose of the evidence and made a decision on whether or not there were substantial grounds to support the orders. (See Res. Memo. 4, footnote 4) The petitioners in fact never challenged the existence of the Orders or whether or not they were based on substantial evidence. Rather, the petitioners' challenge to the orders is on the inequities in the system involving the constitutionality of the producer settlement fund. This was the Secretary's way of circumventing the issue and the evidence cited.

The justification for the taking of private property among handlers was for the public purpose of assuring the consuming public of adequate supplies of milk in the New York market by using the equalization fund as a common fund for the purpose of preventing "cut-throat competition which burdened that marketing". That purpose no longer exists with the amendment in 1954 to the price support system, 7 U.S.C. Section 1446b and 1446c with authorizes the purchase of dairy products to accomplish this end. This is a matter of law and does not require record evidence. These are clearly changed circumstances (See Pet. 7, 8, 14, 18, 26, 27).

5. We will next cite three passages in the respondent's memorandum which are related and are not true. Respondent states at page 3: "That Order [30], among other things, establishes a producer-settlement fund under which producers delivering milk to handlers within the Chicago marketing area receive uniform prices for their milk." At page 4 they state: "Thus, in terms that accurately describe petitioners' challenge here, the Court in Rock Royal characterized the contentions made in that case as follows . . ." At page 6 they state: "It can still be said that 'common funds for equalizing risks are not unknown'."

The petitioner will clarify these statements. First, the description in Rock Royal is not accurate of today's

circumstances. The Court in 1939 was of the belief that there would be no competitive inequities involved in the system, and as seen in the petitioners' petition at pages 8-18, this is not true today. The portion of Rock Royal cited talks about "equalization of wealth". One must understand that we are dealing with two different areas of wealth or economics. One is that of the producer and the price that he receives for his milk. The second is the area of the handler and the monies he earns in his business in the competitive market relative to the manipulation of artificial prices established under regulation at the purchase level and in a free competitive system at the consumer level.

We shall first examine producer economics. Uniform prices established by regulation in Order 30 are below the price that producers receive on the competitive buying market. Competition for producer milk results in premiums of $.20 to over $.50 per hundredweight being paid to producers over and above marketwide blend prices. Competition for producer milk has always established a higher price to the producer than that established by the federal order. If a producer does not receive a higher than market blend price in the way of an absolute price, he then receives free services, free hauling, etc. to compensate him for the difference. We should add that this has also been the result of over-order premiums extracted by cooperatives from handlers through super pools where they have monopolized the market.

There is no producer, to the petitioners' knowledge, that has ever received any monies from the producer settlement fund. The monies from the producer settlement fund are paid only to handlers and the handler then uses this money to buy milk in a competitive market buying situation. Thus the pool negates the purpose of the Class I differential to attract milk for fluid use (Pet. 17). Thus, as the monies paid from the producer settlement fund are paid to handlers, it serves competing handlers.

Second, relative to dairy economics, dairy journals publicize financial reports from larger dairies which list net profits and net sales for the respective reporting period. The net profits generally calculate in the range

of 0.2% to 0.6% of sales. With these kinds of competitive operating margins existing in the dairy business with the subsidizing picture shown to the Court in the petitioners' petition at page 12 et al., it can be understood how the equalization pool is a tool which can be effectively used to monopolize markets.

The issue presented by the petitioners is constitutional in nature and changed circumstances relative to the public purpose justification of the producer settlement fund have been made obsolete by law (7 U. S. C. Section 1446b and 1446c). As the question is constitutional in nature, it is one that must be dealt with by this Court and cannot be dealt with by Congress.

Following is an example of some of the many problems encountered as a result of the equalization pool in federal milk marketing orders. The Community Nutrition Institute just recently petitioned the Secretary of Agriculture for a change in all federal milk marketing orders to allow dairies to use powdered milk for reconstituted milk without reclassification. This would mean to leave the powdered milk price at the lower Class III price levels rather than being reclassified at artificially high Class I prices when reconstituted by a dairy for resale as fluid milk. The purpose of this is to allow consumers to be able to buy reconstituted powdered milk cheaper than fresh fluid milk. This is an example of consumer rebellion against unjustified artificially high Class I prices charged by order regulation and cooperative super pools.

A Supreme Court ruling that the pool is no longer justifiable and thus unconstitutional will eliminate many problems faced in the dairy industry. It would help to fight inflation. It would help the industry to become more economical by eliminating inefficient practices of hauling milk for the purposes of qualifying that milk for pool and gaining subsidies. It would simplify the administration of federal orders, and above all, it would protect the right to private property in the free enterprise system which our forefathers sought to protect in the framework of the constitution. This in turn would allow competition to reduce Class I prices to realistic levels while the producer

is still protected through the price support system.

If, in the area of regulating commerce, circumstances change which result in provisions of regulation being used to violate the provisions of the Fifth Amendment of the Constitution, it is the courts which must recognize this abuse and take the necessary action to prevent inequities and preserve competition which this country urgently needs to protect both the farmers and the consumers from the results of monopolies.

It is the petitioners' prayer that this Court hear and see the evidence so as to allow an unbiased opinion, free of the prejudice petitoners experience in the Department of Agriculture and free of judicial precedent which burdened the lower courts.

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted this 7th day of February, 1980, at Kimberly, Wisconsin.

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